87-1618

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL L. LEWICKI
SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER petitioner's sixth amendment right of confrontation was violated by the admission of the out-of-court statement of the alleged victim where the victim did not appear at trial or at any other time, and the government failed to demonstrate that the alleged victim was unavailable for purposes of the sixth amendment, and where that statement lacked sufficient indicia of reliability and trustworthiness.

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DANIEL L. LEWICKI
SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Daniel L. Lewicki, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at Docket No. 54,572/AR, ___ M.J. ___ (C.M.A., February 2, 1988) (Appendix A). The opinion of the Army Court of Military Review is an unpublished decision, CM 446504 (A.C.M.R., December 9, 1985) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on February 2, 1988, affirming petitioner's conviction dated September 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Statement of the Case

Petitioner was tried by a general court-martial composed of officer and enlisted members at Fort Devens, Massachusetts, on September 7, 17, and 18, 1984. Contrary to his plea, he was convicted of a single offense of taking indecent liberties with two children who were under the age of 16 by exposing his penis to them, and encouraging and allowing them to touch him with the intent to gratify his lust.[1] Petitioner was sentenced to a dishonorable discharge. The sentence was approved in accordance with Article 60, U.C.M.J. The United States Army Court of Military Review affirmed the findings of guilty and the sentence. The issue granted by the United States Court of Military Appeals, satisfying a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER ADMISSION OF THE STATEMENTS OF ONE ALLEGED VICTIM (J.A.) TO HER MOTHER VIOLATED APPELLANT'S RIGHT OF CONFRONTATON.

Disposition of that issue by the Court of Military Appeals is shown in its order at Appendix A.

Statement of Facts

The alleged victims are petitioner's four-year-old daughter, Candice, and her playmate and friend, Jennifer Aspinwall, also four years old. On June 2, 1984, Jennifer was allowed by her parents to go and play at Candice Lewicki's home in the

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[1] A violation of the Uniform Code of Military Justice [hereinafter cited as U.C.M.J.], Article 134, 10 U.S.C. § 934. The two children with whom petitioner was charged with taking these actions were his four-year-old daughter, Candice Lewicki, and her four-year-old playmate, Jennifer Aspinwall.

Fort Devens housing area. The petitioner was home and played children's games with the two girls (R. 180). The offense is alleged to have occurred between the time Jennifer was dropped off at petitioner's quarters and approximately 4:30 P.M. when Jennifer and Candice returned to the Aspinwall home. Jennifer's mother, Mrs. Aspinwall, testified that Jennifer and Candice came into the Aspinwall home and immediately went upstairs (R. 27). Mrs. Aspinwall invited Candice for dinner and gave her a note to take to petitioner to secure his permission (R. 27-8, 137). Candice went home at approximately 8:00 P.M. (R. 29, 139). Before going to bed Jennifer told her mother that while she visited her friend Candice that afternoon, petitioner had exposed his penis to Candice and herself and that they had touched it. There were no other witnesses to the alleged encounter.

In a pretrial session[2] the military judge addressed whether Jennifer Aspinwall would be available to testify at trial. Mrs. Aspinwall testified that she withheld Jennifer's appearance at the pretrial investigation (*see* Article 32, U.C.M.J.), and planned to do so at the trial as well, based on the advice of Dr. Judah, a child psychologist who was treating Jennifer (R. 18-20, 48-49). Dr. Judah's testimony at the pretrial session was that Jennifer might be able to testify with a lot of preparation and fewer observers in the courtroom (R. 76).

In denying the defense motion seeking to preclude introduction of Jennifer's out-of-court statements through her mother (R. 11, Appellate Exhibit V), the military judge ruled that Mrs. Aspinwall could testify as to what Jennifer told her the day of the incident (R. 102). The military judge *did not* find Jennifer to be unavailable, but instead based his ruling on the excited utterance exception to the hearsay rule (R. 225, 242). Although counsel raised the sixth amendment issue of confrontation, the military judge did not discuss it in denying the defense motion.

At trial, Mrs. Aspinwall testified that Jennifer told her that petitioner exposed his penis to Candice and herself and that

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[2] See Article 39(a), U.C.M.J.

she touched it. Dr. Judah testified at a pretrial hearing that Jennifer had told him that she had not touched petitioner's penis. Candice Lewicki did not testify at the court-martial.[3]

According to petitioner's testimony at trial, he had a headache and went upstairs, closed the door, and laid on the bed (R. 181-182). Petitioner stated he unbuttoned and unzipped his pants to get more comfortable before he laid down (R. 182). The next thing he recalled, his daughter and Jennifer were on either side of him and the *front* of his underwear had been pulled down below his scrotum (R. 183). Petitioner testified that he jumped up and ran into the bathroom (R. 183). According to a sworn statement which petitioner gave to agents of the Army Criminal Investigation Command (CID) and which was presented by the prosecution, Jennifer and Candice came into the room after he laid down (Prosecution Exhibits 2 and 3). Jennifer came in with fabric stuffed in her shirt, positioned so as to resemble breasts (Prosecution Exhibit 3; R. 175). Petitioner removed the excess fabric and told Jennifer not to do it again (*id.*). According to petitioner's statement, the children later returned to his room as he slept and pulled down his pants exposing his penis (*id.*).

REASONS FOR GRANTING THE WRIT

Petitioner's criminal conduct was established solely by the contested, hearsay statement of a four-year-old girl who was not subject to cross-examination. Petitioner's pretrial statement and trial testimony explained the alleged victim's allegations and were exculpatory in nature. However, in its decision against the petitioner, the Court of Military Appeals relied on the case of *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), *cert. denied*, 56 U.S.L.W. 3556 (U.S. Feb. 22, 1988) (No. 87-832), in which the government presented an inculpatory statement by the accused. Although this Court denied the writ in *Arnold*, petitioner's case presents more compelling facts to resolve the issue presented.

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[3] No evidence was ever presented against petitioner at any stage of the proceedings by his daughter Candice.

The Court of Military Appeals' opinion in *Arnold*, by its own admission, is of limited precedential value.[4] The issue of whether or not a showing of unavailability is required for purposes of the Confrontation Clause when a statement falls within a firmly-rooted hearsay exception is an important federal question which has not been settled by this Honorable Court. Further, the decision of the Court of Military Appeals on this issue is in conflict with the decisions of this Honorable Court interpreting the requirements of the Confrontation Clause.

I.

WHEN THE OUT-OF-COURT STATEMENT OF A DECLARANT IS OFFERED UNDER A FIRMLY-ROOTED EXCEPTION TO THE HEARSAY RULE, THE FAILURE TO PROVIDE AN ADEQUATE SHOWING OF UNAVAILABILITY OF THE DECLARANT VIOLATES THE PURPOSES OF THE CONFRONTATION CLAUSE AND IS CONTRARY TO THIS COURT'S INTERPRETATION OF THE REQUIREMENTS OF THAT CLAUSE.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court analyzed in great detail the relationship between the Confrontation Clause and the hearsay rule. While this Court did not "map out a theory of the Confrontation Clause that would determine the validity of all hearsay exceptions" (*Id.* at 64-5 (cita-

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[4] Judge Cox in his opinion stated, "Let there be no doubt . . . that this Court favors confrontation, and this case should be read very narrowly." *Arnold*, 25 M.J. at 133. The two other members of the three member Court of Military Appeals did not address the confrontation issue. Judge Sullivan, in his opinion concurring in the result, would affirm based on Arnold's confession, as corroborated by his presence in his own home at the time of the incident, and the victim's agitated demeanor the morning after the incident. *Arnold*, 25 M.J. at 134. Chief Judge Everett, in his dissenting opinion, concluded that the victim's statement to her school counselor was not an excited utterance nor did it fall within any other established hearsay exception. *Id.* at 134-35.

tions omitted)), a general approach to the problem was identified and concisely stated:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (footnote omitted).

In establishing a requirement of unavailability, this Court recognized the "Framers' preference for face-to-face[5] accusation" and that the sixth amendment established a "rule of necessity," *i.e.*, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65.[6] However, a showing of unavailability by the party offering a hearsay statement need not always be made. In *Dutton v. Evans*, 400 U.S. 74 (1970), a witness testified as to a conversation he had with Evans' co-conspirator in the Atlanta Penitentiary. That testimony was admitted under a long standing co-conspirator exception to the hearsay rule under Georgia law. This Court found that the extra-judicial statement involved was of only "peripheral significance"[7] and that the utility of cross-examination was so remote that the Confrontation Clause did not require production of an apparently available witness. This is not the situation in the instant case, where the alleged victim was the only true witness against

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[5] Justice Scalia, during oral argument in Coy v. Iowa (No. 86-6757) on January 13, 1988, emphasized that the Confrontation Clause requires face-to-face confrontation. *See generally* 42 Cr.L. 4121-23 (Jan. 20, 1988).

[6] *Citing* Mancusi v. Stubbs, 408 U.S. 204 (1972); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Motes v. United States, 178 U.S. 458 (1900).

[7] *Id.* at 87.

petitioner. The incriminating hearsay statement of Jennifer Aspinwall was completely contrary to petitioner's exculpatory statement and testimony. Jennifer's hearsay statement was the only substantive evidence attributing criminal activity to petitioner.[8]

Neither a showing of unavailability nor production is required where the out-of-court statement offered is that of a co-conspirator during the course of, or the furtherance of, a conspiracy. *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986). In *Inadi*, this Court overruled the decision of a lower court applying the *Ohio v. Roberts* rule of unavailability to such statements. This Court recognized the unique nature of the statements of a co-conspirator made in furtherance of, or in the course of, a conspiracy[9], and concluded that such statements should be admissible irrespective of the availability or unavailability of the declarant. In the *Arnold* case (relied upon by the court below in the instant case (Appendix A)), the Court of Military Appeals cited *Inadi*, apparently for the erroneous proposition that if a hearsay statement falls within a firmly-rooted hearsay exception, no showing of unavailability is required. *Arnold*, 25 M.J. at 133. *See also United States v. Hines*, 23 M.J. 125, 128 fn.6 (C.M.A. 1986). This Court's decision in *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), indicates that such a broad reading of *Inadi* is not supportable. *Bourjaily*, like *Inadi*, involved the hearsay statements of a co-conspirator offered by the prosecution. In *Bourjaily*, this

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[8] No instruction was given by the trial judge limiting the court-martial members' consideration of Jennifer's hearsay statement. To the contrary, the trial judge specifically instructed that the statement could be considered as substantive evidence (R. 242).

[9] "[S]uch statements provide evidence of the conspiracy's context that cannot be replicated . . . . [T]he statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying. . . . [I]n-court testimony seldom will reproduce a significant portion of the evidentiary value of [a] statement during the course of the conspiracy." Inadi, 106 S.Ct. at 1126.

Court reiterated the two-step approach of *Ohio v. Roberts*, and then pointed out that in *Inadi* the first requirement for a showing of unavailability was eliminated when the hearsay statement is that of a co-conspirator offered by the prosecution. *Bourjaily*, 107 S.Ct. at 2782.[10]

Thus, *Inadi* stands only for the proposition that a showing of unavailablity is not required when the hearsay statement involved is that of a co-conspirator. The statement involved in the instant case does not fall within the co-conspirator exception to the hearsay rule. Therefore, the Court of Military Appeals' abrogation of the unavailability rule based on *Inadi* is incorrect. Although this Court stated in *Ohio v. Roberts* that reliability may be inferred, without more, when a hearsay statement falls within a firmly-rooted hearsay exception, this Court has never held that unavailability may be inferred on the same basis.[11] Petitioner rejects the proposition that the party offering hearsay need not show the declarant unavailable before that statement may be admitted as evidence against an accused merely because it falls within a firmly-rooted hearsay exception. Such an argument is specious because *Inadi* and *Bourjaily* create an exception to that "general approach" only for statements of a co-conspirator made in the course and in furtherance of a conspiracy. *Inadi* is the exception and not the rule.[12]

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[10] This Court went on to hold that the co-conspirator exception to the hearsay rule is firmly rooted and, therefore, no separate inquiry as to the indicia of reliability of such a statement need be made, the second step of the *Ohio v. Roberts* approach.

[11] *But see* State v. Flores, No. 51790 (Ohio Ct. App. Feb. 26, 1987) (WESTLAW, ALLSTATES library, Ohio file); People v. Hughey, 194 Cal. App. 3d 1383, 240 Cal. Rptr. 269 (Cal. Ct. App. 1987); State v. Wilson, 719 S.W.2d 28 (Mo. Ct. App. 1986).

[12] Petitioner notes that the statement of a co-conspirator made during the course and in furtherance of a conspiracy is by definition not hearsay under both the military and federal rules of evidence. *Compare* Military Rule of Evidence [hereinafter Mil.R.Evid.] 801(d)(2)(E), and Federal Rule of Evidence [hereinafter Fed.R.Evid.] 801(d)(2)(E).

Although the trial judge may have found Jennifer Aspinwall to be unavailable to testify at a pretrial investigation hearing[13] and refused to issue a subpoena for her deposition (R. 102), his ruling at trial on the admissibility of her hearsay statement failed to address the issue of confrontation and unavailability. Furthermore, to the extent that the decision of the Court of Military Appeals relies on *Arnold*, that court apparently agreed with petitioner's argument that there was no showing by the government that Jennifer Aspinwall was unavailable.[14] Therefore, the requirements of the Confrontation Clause have not been satisfied and the victim's statement to her mother should not have been admitted.

II

THE STATEMENT OF THE VICTIM TO HER MOTHER DOES NOT BEAR ADEQUATE INDICIA OF RELIABILITY TO SATISFY THE PURPOSES OF THE CONFRONTATION CLAUSE NOTWITHSTANDING ITS CLASSIFICATION AS AS EXCITED UTTERANCE BY THE COURT BELOW.

The second aspect of the two-prong approach of *Ohio v. Roberts* requires that the hearsay sought to be admitted be marked "with such trustworthiness that 'there is no material departure from the reason of the general rule.' " *Id.* at 65, *citing Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934). The reason for the general rule, as explained by *Snyder*, it to prevent a conviction based on depositions or *ex parte* affidavits and to preserve the accused's right to test the recollection of a witness through cross-examination. If a declarant is

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[13] *See* Article 32, U.C.M.J.

[14] In *Arnold* the Army Court of Military Review had found "the government failed utterly to show unavailability. Indeed, the record contains no evidence that the government used any of the normal prosecutorial or judicial means available to secure the presence of the witness. . . ." Arnold, 18 M.J. at 561. The Court of Military Appeals acknowledged this. Arnold, 25 M.J. at 131.

unavailable and his out-of-court statement falls within a firmly-rooted hearsay exception, reliability can be inferred and the purposes of the Confrontation Clause are met.[15] The fact that the excited utterance exception is a firmly-rooted hearsay exception is not at issue here.[16] *See Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987); *United States v. Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1057 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984). *See also United States v. Cree*, 778 F.2d 474, 501-02 (8th Cir. 1985) (Oliver, J., dissenting). The issue also is not whether the statement of the victim in this case would be admissible as an excited utterance under Mil.R.Evid 803(2) as applied by the military courts. Rather, the issue here is whether or not the extrajudical statement of the victim contains "sufficient indicia of reliability and guarantees of trustworthiness to satisfy the interests protected by the confrontation clause." *Haggins*, 715 F.2d at 1057.[17]

In *Haggins*, 715 F.2d at 1050, the Circuit Court of Appeals listed three elements which are necessary for a hearsay statement to be considered an excited utterance under the federal rules and, therefore, to satisfy the Confrontation Clause: there must be an event which is startling enough to cause nervous excitement; the statement must be made before there is time for the declarant to contrive or misrepresent; and, the statement must be made while the declarant is under the stress of the excitement caused by the event. *Id.* at 1057. Application of these criteria in the instant case reflect that the statement of the victim does not contain sufficient indicia of reliability and guarantees of trustworthiness to satisfy the Confrontation Clause, notwithstanding its classification as an excited utterance by any lower court.

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[15] Ohio v. Roberts, 448 U.S. at 66.

[16] Mil.R.Evid. 803(2) is taken verbatim from Fed.R.Evid. 803(2). Manual for Courts-Martial, United States, 1984, Mil.R.Evid. 803(2), analysis.

[17] Although reliability may be inferred when an extrajudicial statement falls within a firmly-rooted hearsay exception (Ohio v. Roberts, 448 U.S. at 66), reliability is only an inference and not a presumption.

Petitioner submits that the mere fact that the court below may have conveniently tucked this hearsay statement "into a time honored hearsay exception" should not be dispositive. *Puleio v. Vose*, 830 F.2d at 1207. As explained in detail below, the hearsay statement of Jennifer Aspinwall does not meet the test for an exception to the general rule against use of hearsay. *See Haggins*, 715 F.2d at 1050. Therefore, no inference of reliability should attach for purposes of satisfying the Confrontation Clause.

Petitioner notes that to the extent the Court of Military Appeals relies on the cases of *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986), and *United States v. Iron Shell*, 633 F.2d 77 (1980), these cases are inapposite. *LeMere* was a case involving alleged child sexual abuse. In *LeMere*, the court held that because the victim was subject to cross-examination at trial, any error in the admission of the victim's hearsay statement was harmless. In the instant case, unlike the *LeMere* case, the petitioner had no opportunity at all to cross-examine, interview, or depose the victim.

In *Iron Shell*, the Eighth Circuit Court of Appeals held that the testimony of a doctor, who examined the nine-year-old victim, concerning statements made by her following her assault was related to her physical condition and was consistent with the motive to provide treatment and, therefore, came within the purview of Fed.R.Evid. 803(4), dealing with medical diagnosis and treatment. The court in *Iron Shell* also held that the hearsay testimony of a police officer as to what the victim said following the assault fell under the excited utterance exception to the hearsay rule when the victim's statement was made between 45 minutes and 75 minutes after the event. The Eighth Circuit in *Iron Shell* held that even if this statement was not an excited utterance, sufficient other evidence was available to find the hearsay cumulative and, therefore, its admission harmless error. The petitioner's case is not as easily resolved. In the instant case, five hours passed between the alleged offense and the statement by the victim, compared to the 75 minutes in *Iron Shell*; furthermore, the remaining evidence is inconclusive as to the petitioner's guilt.

Other facts in the instant case, in addition to the passage of time from the offense to the statement by the victim, subject her statements to a critical examination for reliability. Jennifer Aspinwall's statements to her mother were not volunteered but were elicited by her mother who became increasingly more tense and nervous as she questioned Jennifer. The conflicting stories which Jennifer gave to her mother and to Dr. Judah, the child psychologist, warranted cross-examination.[18] Most importantly, Jennifer had given opposite answers to a key issue of the case, *i.e.*, whether or not she touched petitioner's penis. Dr. Judah testified that Jennifer told him that she did not touch petitioner's penis (R. 89); the hearsay statement offered by Mrs. Aspinwall was that Jennifer did touch petitioner's penis (R. 33). Dr. Judah also presented a diagnosis which reflected on the reliability of the hearsay statement: that Jennifer's conduct was consistent with either an abused child (R. 65) or a lying child (R. 275). Clearly, the opportunity to cross-examine the only true witness was critical to petitioner's case.

CONCLUSION

The Court of Military Appeals affirmed the conviction of the petitioner. That conviction was based solely on extrajudicial hearsay statements of the four-year-old alleged victim admitted at trial through testimony by the victim's mother. The only true witness against petitioner, the alleged victim, was never present at trial, she was never subjected to cross-examination, and her demeanor was never subjected to face-to-face scrutiny by the trier-of-fact. The victim was never deposed, seen, or interviewed by the petitioner. Her damning allegations were merely repeated at trial by a partial and personally interested third party to whom they were made after the victim had had time for reflective thought and

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[18] Dr. Judah did not testify on the merits at trial, but Dr. Judah had testified at the pretrial investigation and during the preliminary session at the trial. Thus, petitioner's defense counsel had potential rebuttal evidence if Jennifer had testified on the merits.

several hours after the excitement of the events she related had passed. The necessity for proceeding against petitioner in this manner was never demonstrated by the government. There was no showing by the government that the victim was unavailable for purposes of the Confrontation Clause. Petitioner's right of confrontation was, therefore, violated by admission of the victim's extrajudicial statements in this case. The sixth amendment right of confrontation is a substantial right; the violation was neither minimal nor justified. For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54572/AR
CMR Dkt. No. 446504

UNITED STATES, APPELLEE

v.

DANIEL L. LEWICKI (221-50-4560), APPELLANT

ORDER

Appellant was found guilty of taking indecent liberties with two females under the age of 16, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. His petition for review was granted to determine if admission at trial of the victim's statements regarding the offenses, through the testimony of her mother, violated appellant's right of confrontation because the child did not appear in court. We hold it did not. Mil.R.Evid. 803(2), Manual for Courts-Martial, United States, 1984. *See United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). *See also United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), and *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986). Accordingly, it is, by the Court, this 2d day of February, 1988,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

Judge SULLIVAN concurs in the result.

For the Court,

/s/ John A. Cutts, III
JOHN A. CUTTS, III
Deputy Clerk of the Court

EVERETT, Chief Judge (dissenting):

See my dissenting opinion in *United States v. Arnold*, 25 M.J. 129, 134 (C.M.A. 1987).

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (LONERGAN)
Appellate Government Counsel (O'HARE)

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 446504

UNITED STATES, APPELLEE

v.

SERGEANT E-5 DANIEL L. LEWICKI (221-50-4560), UNITED STATES ARMY, APPELLANT

Before

COMEAU, WATKINS, AND LYMBURNER
Appellate Military Judges

S. L. TRAIL, Military Judge

For Appellant: Lieutenant Colonel William P. Heaston, JAGC, Major Edwin D. Selby, JAGC, Captain Claudio F. Gnocchi, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Michael W. Hoadley, JAGC (on brief).

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9 December 1985

MEMORANDUM OPINION

Per Curiam:

Convicted contrary to his pleas and punished by general court-martial for taking immoral and indecent liberties with two female children under the age of sixteen, the appellant

alleges error in the trial record resulting from (1) the failure of the trial judge to direct the reopening of the pretrial (Article 32, UCMJ) investigation or, alternatively, to order that the two alleged victims be deposed,[1] and (2) a denial of the right of confrontation with respect to the alleged victim Jennifer A. We find no error or other basis for appellate relief and affirm.

Concerning the former assignment of error, we have no difficulty in concluding that the judge's ruling was correct. Pertinently, the record of trial reflects (1) that, along with several other witnesses, Candice appeared at the Article 32 Investigation; (2) that Jennifer A. was absent and was determined to be unavailable; and (3) that the defense did not request that either of the alleged victims be called to testify at the pretrial investigation. Under such circumstances, we find that the trial judge did not abuse his discretion in denying the requested relief.

Similarly, in view of the fact that the accused did not at any time request that Jennifer A. be called as a witness at his court-martial, we find no confrontation violation.

We have also considered the issues raised personally by the appellant and determined that they are without merit.

The findings of guilty and the sentence are affirmed.

FOR THE COURT,

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of the Court

[1] The alleged victims in this case were Candice, four-year-old daughter of the appellant and Jennifer A., four-year-old playmate of Candice.

U.S. GOVERNMENT PRINTING OFFICE 1988—209 781 62023

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Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1618

In the Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL L. LEWICKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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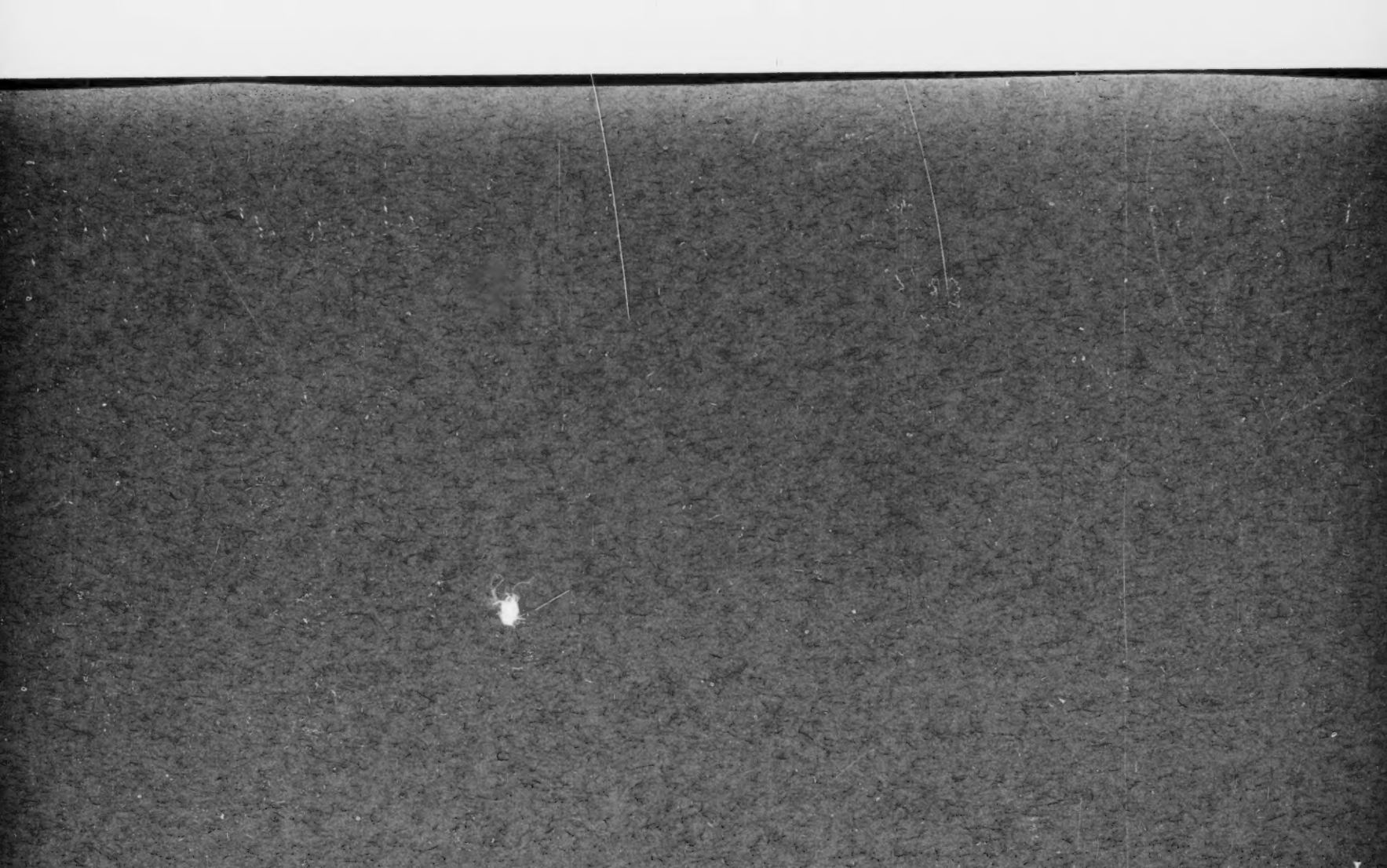

QUESTION PRESENTED

Whether the admission as an excited utterance of statements made by petitioner's four-year-old neighbor to her mother violated the Confrontation Clause of the Sixth Amendment.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a-2a) is reported at 26 M.J. 63. The opinion of the Army Court of Military Review (Pet. App. 3a-4a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on February 2, 1988. The petition for a writ of certiorari was filed on March 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Devens, Massachusetts. He was convicted of taking indecent liberties with two children under the age of 16, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to a dishonorable

discharge. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 3a-4a). The Court of Military Appeals affirmed by order (*id.* at 1a-2a).

1. On June 2, 1984, Jennifer Aspinwall and petitioner's daughter Candice Lewicki, two four-year-old girls, were left in the exclusive care of petitioner from approximately 3:00 p.m. until 4:30 p.m. (GX 3; Tr. 179-203). Petitioner's wife was working at the time (Tr. 197). While the children were in his care, petitioner allowed the children to expose his genitals and to touch his penis.

a. In a sworn pretrial statement given to an agent of the Army's Criminal Investigation Division,[1] petitioner admitted that he played with the children, and that Jennifer Aspinwall sat on his lap. Her "squirming about" caused him to become sexually aroused, "meaning that [petitioner] was getting an erection" (GX 3; Tr. 174). Petitioner stated that he went upstairs to lie down (GX 3; Tr. 175). The children followed him. They induced petitioner to play by placing clothing under their shirts and pants. Petitioner's role in the game was to pull the clothing out. Jennifer placed clothing under her shirt in a manner that, to petitioner, at least, resembled breasts (*ibid.*). Petitioner admitted that he reached beneath the girls's shirts and inside their pants to remove the clothing placed there, but he denied putting his hand inside the girls' underwear (*ibid.*). Petitioner stated that he had unbuttoned his pants and

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[1] Petitioner did not challenge the voluntariness of his statement at trial, although he did claim that his statement was not corroborated, as required by Mil. R. Evid. 304(g) (AX 7; Tr. 172). Under that Rule, a defendant's statement may be considered as evidence of his guilt only if independent evidence, direct or circumstantial, sufficiently corroborates the essential facts of the statement as to justify an inference that it is truthful.

partially lowered his zipper "so [he] could rest comfortably" (*ibid.*). The children started to pull on his pants and underwear, exposing his genitals (GX 3; Tr. 175, 179). Petitioner admitted he was fully aware of what was occurring and that he did nothing to stop the children (GX 3; Tr. 176). He knew that he was feeling something that he should not be feeling, and it scared him (GX 3; Tr. 176). Petitioner conceded that he should not have permitted the children to do what they were doing, but he did not explain why he failed to stop them (GX 3; Tr. 177).

Petitioner had a partial ejaculation (GX 3; Tr. 176). He asserted that his ejaculation was unrelated to the actions of the children, claiming he always had a release of seminal fluid when his erections subsided (*ibid.*). Although petitioner did not realize that he had partially ejaculated until he permitted the children to expose his penis, he claimed that his ejaculation occurred before the children entered the room (GX 3; Tr. 178).

Petitioner's daughter, Candice, put her hand on her father's penis for several seconds (GX 3; Tr. 176). Petitioner admitted that his daughter may have rubbed his penis while touching it (GX 3; Tr. 177). Petitioner apparently did nothing to prevent or interrupt the contact. Candice removed her hand and said something to Jennifer, who also touched petitioner's penis (GX 3; Tr. 176).

Petitioner went to the bathroom where he cleaned his penis and waited until his erection subsided (GX 3; Tr. 176). Petitioner returned and told the children they should not touch people "in that area" (GX 3; Tr. 177). Petitioner also admitted telling the children that they should not tell anyone else what had happened.[2] Petitioner then went to

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[2] Petitioner testified that, when he told Jennifer Aspinwall that he was going to tell her parents what had occurred, Jennifer started whimpering, assumed a fetal position, and then started crying (Tr. 198).

sleep (*ibid.*).[3]

b. Jennifer and Candice returned to the Aspinwall residence at approximately 4:30 p.m. Jennifer's mother invited Candice to stay for dinner. As the children left to ask permission from Candice's parents, Jennifer told her mother, "we have a secret and we can't tell you or Daddy or [petitioner's spouse]" (Tr. 137).[4] The children returned and went upstairs to eat (Tr. 138-139). Candice went home at approximately 8:00 p.m. that night, and Mrs. Aspinwall decided to wash Jennifer's hair (Tr. 139). While Mrs. Aspinwall dried Jennifer's hair, Jennifer said "[petitioner] was pulling little toys out of our britches," Jennifer's term for underwear (Tr. 140-141).[5]

Mrs. Aspinwall was concerned, but behaved as if there was "no problem" (Tr. 140). When Mrs. Aspinwall asked Jennifer to tell her more about what happened, Jennifer told her, "This is a secret that we're not supposed to tell" (Tr. 141). Jennifer told her mother that petitioner had been pulling "toys" out of Candice's underwear too (*ibid.*). Jennifer was "giggly," "fidgety," and "nervous" (*ibid.*). Mrs. Aspinwall asked if petitioner had touched Jennifer between the Legs. Jennifer said no. Her demeanor was

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[3] At trial, petitioner recanted his prior, sworn admissions (Tr. 189). He specifically claimed that he was asleep when the children pulled his pants down (Tr. 182-183, 189). He also claimed that he did not know whether the children touched his penis (Tr. 190). Petitioner explained that he had lied in his sworn statement to "protect" Jennifer Aspinwall and his daughter from interrogation by the Army's Criminal Investigation Division (Tr. 188, 190).

[4] Mrs. Aspinwall testified that when Jennifer said that she and Candice had a secret, petitioner's daughter "went very rigid" and was trembling (Tr. 137-138). Jennifer told Candice not to worry and that she would not reveal their secret (Tr. 138).

[5] At the pretrial hearing, Mrs. Aspinwall testified that she learned from Jennifer that "toys" meant clothes (Tr. 38).

"real serious" (*ibid.*). She was very upset and started to get "blotchy," indicating that she was about to cry (*ibid.*).

When Mrs. Aspinwall asked what else had occurred, Jennifer began to cry (Tr. 142). She told her mother that petitioner had said that because it was alright for him to pull "toys" out of their britches, it was alright for them to pull toys out of his (*ibid.*). Jennifer was "truly upset" (*ibid.*) and cried "real hard" as she told her mother that petitioner had pulled his pants down and "let his thingy fall out" (*ibid.*). Mrs. Aspinwall let her stop crying before she asked what happened next (*ibid.*). Jennifer told her mother that petitioner had said the children could play with his "thingy" (Tr. 142-143) and that she and Candice had done so (Tr. 142). Mrs. Aspinwall comforted Jennifer for a few minutes, gave her a bath, and put her to bed (Tr. 142-143). After her husband arrived, they called the police, who arrived immediately (Tr. 144). Because Jennifer was in bed, she was not questioned at that time (Tr. 148).

Two CID agents came to the house the next day and, together with her parents, tried to ask Jennifer what had happened (Tr. 149). She told them about petitioner pulling the "toys" out of her britches. When pressed for more detail, however, she began to cry (*ibid.*). She repeatedly said, "I don't remember" (*ibid.*).[6]

Jennifer's behavior subsequently became quite erratic. Her mother saw her playing with herself and exposing herself to other children (Tr. 145-146), which she had

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[6] Mrs. Aspinwall testified during the motion hearing that Jennifer had never told her a similar story (Tr. 40). Mrs. Aspinwall also indicated that she and her husband were "fussy" concerning the influences to which their children were exposed (Tr. 144). They monitored the television programs that Jennifer watched, and they maintained no sexually suggestive materials in the house (Tr. 144-145).

never done before. At the same time, Jennifer also showed concern about anyone seeing her in a state of undress (Tr. 146), and she exhibited other atypical behaviors.[7] Jennifer's parents sought the assistance of Dr. Richard Judah, a psychologist.[8]

2. Petitioner moved before trial to exclude Jennifer's statements to her mother. He argued that the statements were not admissible under Mil. R. Evid. 803(2)[9] as excited utterances because three-and-one-half to five hours had passed between the time of the alleged incident and the time that Jennifer uttered her statements (AX 5, at 3). Petitioner also maintained that the Confrontation Clause barred the admission of the statements, because the government could have subpoenaed Jennifer to testify at trial (*id.* at 4). At a pretrial hearing on petitioner's motion, the government presented the testimony of Dr. Judah. Dr. Judah testified that it would not be in Jennifer's best interest to appear as a witness in the absence of special preparation for the questioning she would face about the experience (Tr. 72). He indicated that the experience could be very upsetting to Jennifer (Tr. 73), and that there was a

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[7] These included masturbatory gestures (Tr. 146), and regressive, baby-like behavior (Tr. 146-147). During her testimony on the motion, Mrs. Aspinwall also indicated that Jennifer had sleep disturbances, including nightmares. Jennifer had never had problems sleeping prior to the incident (Tr. 43-44).

[8] Dr. Judah did not testify at trial, although he did testify at a hearing on the admissibility of Jennifer's statements to her mother and at sentencing (Tr. 55-96, 272-286). Dr. Judah met with Jennifer Aspinwall alone and with her mother present (Tr. 58-59). His testing and interviewing led him to conclude that Jennifer had been subjected to sexual molestation (Tr. 69). He also believed that Jennifer "definitely" needed psychological counseling as a result of the molestation (Tr. 65).

[9] Mil. R. Evid. 803(2) was adopted without change from the Federal Rules of Evidence.

greater potential for the experience to be traumatic rather than beneficial (Tr. 75). Dr. Judah testified that Jennifer could possibly testify "if certain conditions which are probably uncommon to courts" were considered (*ibid.*). Those conditions included "a lot of preparation," being accompanied by someone she trusted, and meeting the judge in closed chambers with her parents (Tr. 75-78). According to Dr. Judah, petitioner's presence could bias her responses (Tr. 77). Petitioner offered no contrary evidence, and he did not contend that the prosecution should be required to prepare Jennifer to testify in the manner suggested by Dr. Judah.

The trial judge denied petitioner's motion and permitted Mrs. Aspinwall to testify about Jennifer's statements to her (Tr. 102). Petitioner did not subpoena Jennifer, and she did not testify at trial. See *ibid.* (trial court noted that defense did not request that a subpoena be issued for Jennifer); Defense Request for Witnesses (Aug. 28, 1984) (omitting Jennifer). At the close of the case, the trial judge instructed the panel that Jennifer's statements were excited utterances under Mil. R. Evid. 803(2) (Tr. 241-242).[10] The judge also found that the excited utterances were sufficient to corroborate petitioner's admissions (Tr. 103), and the judge therefore admitted petitioner's sworn statement (GX 3; Tr. 174-179). The panel convicted petitioner by exceptions and substitutions.[11]

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[10] Although no limiting instruction was given by the trial judge concerning the panel members' consideration of the excited utterances, petitioner did not request such an instruction, and he specifically indicated that he had no objection to the instruction proposed by the trial judge (Tr. 226).

[11] Petitioner was originally charged with taking indecent and immoral liberties with two girls under the age of 16 years by "*telling* them to touch his penis, and *having* them touch his penis" (Tr. 9 (emphasis added)). He was convicted of "*encouraging* them to touch his penis, and *allowing* them to touch his penis" (Tr. 270 (emphasis added)).

3. The Army Court of Military Review affirmed (Pet. App. 3a-4a). It found that petitioner's failure at any time to request that Jennifer Aspinwall be called as a witness was inconsistent with his claim that his confrontation rights had been violated (*id.* at 4a). The Court of Military Appeals summarily affirmed by a divided vote, holding that petitioner's right of confrontation was not violated (*id.* at 1a-2a).[12]

ARGUMENT

Petitioner claims that Jennifer Aspinwall's statements to her mother were admitted into evidence in violation of the Confrontation Clause of the Sixth Amendment. Petitioner's claim, however, is quite narrow. Petitioner does not contend that Jennifer Aspinwall's statements were not excited utterances, nor does he argue that the excited utterance exception to the hearsay rule is not firmly rooted.[13] Instead, petitioner argues that Jennifer

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[12] Judge Sullivan concurred in the result without opinion (Pet. App. 1a). Chief Judge Everett dissented for the reasons given in his dissenting opinion in *United States* v. *Arnold*, 25 M.J. 129, 134-135 (C.M.A. 1987), cert. denied, No. 87-832 (Feb. 22, 1988), in which he concluded that similar statements were not excited utterances, because of the delay between the time of the incident and the time that the child made the statements.

[13] The courts of appeals have agreed that the excited utterance exception is firmly rooted in the common law. *Puleio* v. *Vose*, 830 F.2d 1197, 1205-1206 (1st Cir. 1987) (citing a long history of cases over the past 200 years approving the excited utterance exception); *United States* v. *Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); *McLaughlin* v. *Vinzant*, 522 F.2d 448, 450 (1st Cir.), cert. denied, 423 U.S. 1037 (1975); *United States* v. *Arnold*, 25 M.J. at 133 (opinion of Cox, J.); see also *United States* v. *Cree*, 778 F.2d 474, 502 (8th Cir. 1985) (Oliver, J., dissenting).

Aspinwall's statements should not have been admitted because the government failed to show that she was unavailable to testify at trial and because her statements were not sufficiently reliable. Neither claim has merit.

1. Petitioner relies (Pet. 5-9) on *Ohio* v. *Roberts*, 448 U.S. 56 (1980), to support his claim that the government should have been required to prove that Jennifer Aspinwall was unavailable. *Roberts*, however, does not require proof of the declarant's unavailability as a prerequisite to the admission of every out-of-court statement. *Roberts* involved the question whether the admission at trial of testimony given at a preliminary hearing violated the Confrontation Clause, and the cases cited and discussed in the Court's opinion involved the introduction at trial of testimony given at a prior judicial proceeding. *Id.* at 65, 74. The statement in *Roberts* on which petitioner relies—that an out-of-court statement is inadmissible unless the declarant is shown to be unavailable (*id.* at 69)—must be read in light of the facts of that case. As this Court subsequently explained in *United States* v. *Inadi*, 475 U.S. 387, 394 (1986) (citations and footnote omitted), "*Roberts* simply reaffirmed a longstanding rule * * * that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."

Although petitioner claims that *Inadi* stands only for the proposition that co-conspirator declarations can be introduced without the need to show that the declarant is unavailable, the rationale of *Inadi* is broader than that. The Court in *Inadi* distinguished prior testimony—requiring a showing of unavailability—from other kinds of testimony, not just from co-conspirator declarations. While former testimony "often is only a weaker substitute

for live testimony," the Court explained, other exceptions to the hearsay rule have "independent evidentiary significance of [their] own." 475 U.S. at 394.

The *Inadi* analysis also applies to excited utterances. Like a co-conspirator declaration, an excited utterance "often will derive its significance from the circumstances in which it was made." 475 U.S. at 395. As in the case of a co-conspirator declaration, an excited utterance may be even more reliable than subsequent in-court testimony, because the relationship between the parties at the time of trial may significantly affect the reliability of the evidence the declarant gives from the stand. Thus, like co-conspirator declarations, excited utterances "derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Id.* at 395-396.[14]

Concerns over reliability do not justify requiring the government to prove that a declarant is unavailable before the trial court may admit excited utterances. The primary function of the Confrontation Clause is to enhance the reliability of the fact-finding process at trial.[15] The historical process of defining exceptions to the hearsay rule has identified classes of out-of-court statements that are particularly reliable. For that reason, the Court has explained that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Roberts,* 448 U.S. at 66.

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[14] Dean Wigmore noted that evidence of this nature is "better than is likely to be obtained from the same person upon the stand." 6 J. Wigmore, *Evidence* § 1748, at 199 (Chadborn rev. ed. 1976).

[15] "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion); see also *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985); *Roberts*, 488 U.S. at 66.

Excited utterances have historically been admissible as exceptions to the hearsay rule, because they are made under circumstances indicating that they are sincere and because they ordinarily are made before a person develops a motive to fabricate. See *McCormick on Evidence* § 297, at 855 (3d ed. 1984). For those reasons, excited utterances are sufficiently reliable that the additional safeguard of cross-examination is not constitutionally required. Excited utterances are admissible without a showing of unavailability, not because the Confrontation Clause is "a codification of the rules of hearsay," but because an excited utterance is one example of the situation where "the overlap is complete" between the constitutional provision and the hearsay rules (*California* v. *Green*, 399 U.S. 149, 155 (1970)), and because cross-examination is not necessary to ensure reliability.[16]

Petitioner's argument that the government should have been required to produce Jennifer rests largely on his claim that his pretrial statement was "exculpatory" (Pet. 4, 7) and his corollary assertion that he was convicted solely on the basis of Jennifer's excited utterances (Pet. 4, 6-7, 12). Since both claims are erroneous, petitioner's argument falls with its premises.

Petitioner's pretrial statement is not exculpatory;[17] nor did petitioner describe his statement in that manner at

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[16] Indeed, the record indicates that petitioner did not want Jennifer to testify at trial. At a pretrial hearing, petitioner asked the trial judge to subpoena Jennifer and reopen the Article 32, UCMJ, 10 U.S.C. 832, pretrial investigation, or to order that the defense be allowed to depose Jennifer and to issue a subpoena for the deposition (AX 2; Tr. 15, 21). Petitioner declined to ask the trial judge to subpoena Jennifer to testify at trial.

[17] Petitioner admitted (GX 3; Tr. 175-176) that:

> The kids came into the room again and at this time somehow they both started to pull on the front pockets area of my pants and my

trial. On the contrary, at trial petitioner sought to exclude his admissions from evidence on the ground that they had not been corroborated (AX 7; Tr. 172). Petitioner's vigorous attempts to keep his pretrial statements out of evidence thoroughly refute his present claim that those statements were exculpatory.[18] It is also inaccurate to claim, as petitioner does, that he was convicted "solely" (Pet. 4, 12) on the basis of Jennifer's statements. Petitioner's sworn pretrial statement made him the principal architect of his own conviction. Jennifer's excited utterances, although independently admissible, served to corroborate petitioner's admissions.

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pants started to come down (unzip). My pants never left my hip behind me but the front part was pulled down to expose my underwear. At that time the girls both pulled on my underwear down to expose my penis, it was pulled down to the extent that the pants and the underwear were below my scrotum exposing my penis and the scrotum. I was fully aware of what was going on but did not do anything to stop them. I knew that I was feeling something that I shouldn't have been feeling and it scared me. At that point, I realized that I had had a partial ejaculation as there was seminal fluid on my hip area. The reason that occurred was because my penis had started to go down and I always have a release of seminal fluid when my penis goes down. I did not have a full ejaculation nor was the partial ejaculation a result of any caressing on the girls' or my part. As this point, Candice then put her hand around on my penis and kept it there at the most 2-3 seconds. She then removed it and said something to Jennifer in a way to prompt her to do the same thing. Jennifer then touched me in a way that she was slapping it just to see what it felt like.

[18] Petitioner clearly recognized at trial that this pretrial statement was inculpatory. He disavowed those portions of the statement in which he admitted that he was awake when the children pulled down his pants and touched his penis, and his statement that he remembered that the children actually touched his penis. The point was not lost on the panel members. One of the panel members asked petitioner (AX 11; Tr. 216), " 'How do you account for the drastic differences between your testimony and your signed [pretrial] statement?' "

2. Although petitioner concedes that the excited utterance exception is a firmly rooted exception to the hearsay rule (Pet. 10), he maintains that Jennifer Aspinwall's excited utterances lacked sufficient indicia of reliability to satisfy the Confrontation Clause. That claim lacks merit. As this Court explained in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 10 (citation omitted), "*Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. * * * [N]o independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' "

In any event, Jennifer's statements to her mother were trustworthy. In the first place, Jennifer's statements were corroborated by petitioner's own pretrial statement, which served as powerful support for the reliability of Jennifer's statements. Moreover, when due consideration is given to Jennifer's age, the testimony given by Jennifer's mother and Dr. Judah that Jennifer had suffered psychological trauma, and the impulsive, nondeliberative nature of Jennifer's statements to her mother, the reliability of those statements is apparent.[19] Additionally, there was no evidence that Jennifer had any motive to fabricate her accusations. Indeed, Mrs. Aspinwall testified that Jennifer liked petitioner a great deal and that he had been "a great friend" (Tr. 150). Under these circumstances, Jennifer's statements to her mother were sufficiently reliable to

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[19] The lapse of time between a startling event and the out-of-court statement, although relevant, is not dispositive of the application of Rule 803(2). *United States* v. *Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). Additionally, Jennifer's statement, couched in "childish terminology," has "the ring of verity and is entirely appropriate to a child of [her] tender years." *United States* v. *Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979).

justify their admission even though she was not present at trial.

Petitioner argues (Pet. 12) that Jennifer's statements were unreliable because they were not volunteered but were elicited by her mother, and because Jennifer gave conflicting accounts to her mother and to Dr. Judah as to whether she touched petitioner's penis.[20] Petitioner did not rely on either ground at trial,[21] but neither one is persuasive. If petitioner had wanted to point out a discrepancy, he could have done so in other ways. Jennifer's mother testified at trial (Tr. 133-152), and petitioner could have questioned her about the manner in which she asked Jennifer about the incident. Moreover, even if petitioner did not want to call Jennifer as a witness, he could have sought to introduce her statements to Dr. Judah pursuant to Mil. R. Evid. 803(4), which allows hearsay statements made for the purpose of diagnosis or treatment to be admitted at trial. *United States* v. *Welch*, 25 M.J. 23

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[20] Petitioner asserts (Pet. 12) that "Dr. Judah also presented a diagnosis which reflected on the reliability of the hearsay statement: that Jennifer's conduct was consistent with either an abused child (R. 65) or a lying child (R. 275)." Dr. Judah, however, did not testify that he believed Jennifer was lying about the incident. On the contrary, he testified that "I'm certain she has been subjected to sexual molestation" (Tr. 69; see also *id.* at 69-70, 93), and that he did not believe that she was lying (*id.* at 95: "[Trial judge]: Now, during this interview with her, were you able to tell whether she'd been truthful to all the answers, or do you feel that on some of them, she was being untruthful and trying to avoid some of the questions? [Dr. Judah]: I felt that she was becoming avoidant. I didn't think she was being, quote, untruthful. I think she was becoming more confused than anything.").

[21] Petitioner's pretrial motion argued that Jennifer's statements to her mother were unreliable because they were inconsistent with his own daughter's account of the incident (AX 5, at 4).

(C.M.A. 1987).[22] Petitioner apparently declined to pursue that option because of Dr. Judah's strongly held views that Jennifer was a victim of sexual abuse. Accordingly, the trial judge's ruling that Jennifer's statements were admissible did not deny petitioner the opportunity to challenge the reliability of those statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

[22] Although the trial judge ruled that the government could not call Dr. Judah at trial as a prosecution witness (Tr. 102), petitioner never sought to have Dr. Judah testify as a defense witness.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60427